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Measuring Brief (Save Our Climate)

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TWENTY-EIGHTH ANNUAL JEFFREY G. MILLER PACE NATIONAL ENVIRONMENTAL LAW MOOT COURT COMPETITION

Measuring Brief*

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Docket Nos. 14-000123 and 14-000124
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

SYLVANERGY, L.L.C.,
Petitioner,
v.
SHANEY GRANGER, in her official capacity as Regional Administrator for Region XIII of the United States Environmental Protection Agency,
Respondent,
and
SAVE OUR CLIMATE, INC.,
Petitioner,
v.
SHANEY GRANGER, in her official capacity as Regional Administrator for Region XIII of the United States Environmental Protection Agency,
Respondent.

ON CONSOLIDATED PETITIONS FOR REVIEW OF A FINAL ORDER OF THE REGIONAL ADMINISTRATOR

Brief of SAVE OUR CLIMATE, L.L.C., Petitioner

* This brief has been reprinted in its original format. Please note that the Table of Authorities and Table of Contents for this brief have been omitted.

JURISDICTIONAL STATEMENT

This is a petition for review of a PSD permit issued under the Clean Air Act by a state agency through its delegated authority of the EPA. Petitioners Save Our Climate, Inc., and Sylvanergy, L.L.C., timely filed petitions for review of the permit with the Environmental Appeals Board under 40 C.F.R. pt. 124 (2015). The EAB issued its order on June 1, 2015. Save Our Climate and Sylvanergy then filed timely petitions for review in this Court, less than 60 days after June 1, 2015. Sylvanergy, however, also petitions this Court to review the state agency's applicability determination, which preceded the issuance of the PSD permit. At the very latest, Sylvanergy had date notice of the applicability determination on June 12, 2014, when the state agency issued the PSD permit.

This Court has jurisdiction under section 42 U.S.C. § 7607(b)(1) (2012), which provides that a petition for review of final EPA action shall be filed in the United States Court of Appeals for the appropriate circuit within 60 days from the date notice of the final action. *Id.* Therefore, this Court has jurisdiction over the timely-filed petitions for review of the PSD permit issued to Sylvanergy, but does not have jurisdiction over Sylvanergy's petition for review of the state agency's applicability determination, as it was not filed within 60 days of the date notice of the action.

STATEMENT OF THE ISSUES

I. Whether this Court has jurisdiction under 42 U.S.C. § 7607(b)(1) to review Sylvanergy's untimely petition of NUARB's denial of its request for a Non-Applicability Determination.

II. Whether NUARB was arbitrary and capricious in determining that the Sylvanergy facility is a "major emitting facility" subject to PSD review.

III. Whether Sylvanergy is subject to PSD review as an emitter of greenhouse gases.

IV. Whether NUARB properly rejected consideration of a wood gasification and partial carbon capture and storage plant as BACT on the grounds that it "redefines the source."

V. Whether NUARB properly selected the Sustainable Forest Plan as BACT without considering its adverse environmental impacts.

STATEMENT OF THE CASE

This is a petition for judicial review of a permitting authority's decision to grant a Prevention of Significant Deterioration ("PSD") permit to a new facility. Specifically, Sylvanergy, L.L.C., seeks to build a new electricity generation and wood pellet production facility in Forestdale, New Union. Because the entire State of New Union is an attainment area, new "major emitting" facilities are required to obtain a PSD preconstruction permit, ensuring that their facilities will meet certain emission limitations. These permits are reviewed and granted by the New Union Air Resources Board ("NUARB"), which exercises delegated authority of the EPA.

Sylvanergy's proposed facility (the "Facility") would operate by way of an advanced stoker design wood-fired boiler along with two ultra-low sulfur diesel start-up burners. The Village of Forestdale issued a site plan approval with a limitation on the Facility's operating hours, limiting it to 6,500 hours per year and a capacity factor of 75%.

Sylvanergy petitioned NUARB for a Non-Applicability Determination ("NAD"), arguing that the PSD permitting process

was not applicable to the proposed facility because its emissions would not meet certain thresholds bringing it within the definition of "major emitting facility," under the Clean Air Act ("CAA"). NUARB rejected these arguments and required that Sylvanergy's new facility undergo the PSD permitting process. NUARB approved Sylvanergy's flue controls for particulates, sulphur dioxide, nitrogen oxides, carbon monoxide, and VOCs as constituting Best Available Control Technology ("BACT"). These permit requirements are not being challenged. NUARB also required Sylvanergy's facility to undergo PSD review for greenhouse gas ("GHG") emissions based on its release of 350,000 tons per year when operating at a 96% capacity factor.

Under the BACT analysis for GHGs, NUARB considered four control technologies. It eliminated the first technology, carbon capture and storage, on the grounds that it would not control the CO_2 from the flue controls. It eliminated the second technology, the use of cleaner fuels, on the grounds that it would impermissibly redefine the source by requiring the facility to change its planned fuel. It eliminated the third technology, wood gasification and partial carbon capture and storage, on the grounds that it would also redefine the source. NUARB accepted the fourth technology, a Sustainable Forest Plan, as BACT because it would offset about 70% of GHG emissions and was required by Executive Order 005-12, which requires state agencies to try to achieve carbon neutrality.

Sylvanergy and Save Our Climate ("SOC") both filed petitions for review to the Environmental Appeals Board ("EAB"). Sylvanergy argued that it should have received its NAD and that it was not subject to PSD review for GHG emissions. SOC asserted that denial of the NAD was correct. However, SOC argued it was error for NUARB to reject wood gasification and partial carbon capture and to select the Sustainable Forest Plan as BACT without considering the adverse environmental effects raised during the comment period.

The EAB denied both parties' petitions for review, stating that neither displayed clear legal or factual error on the part of NUARB. Both parties now seek review from this Court.

STATEMENT OF FACTS

The facts of this case center on the details of the facility that Sylvanergy seeks to build and how those facts impact the facility's regulation under the CAA.

The Proposed Facility. Sylvanergy proposes to construct a 500 million Btu/hour electricity generation and wood pellet production facility in Forestdale, New Union. R. at 5. The Facility would include an advanced stoker design wood-fired boiler together with two ultra-low sulfur diesel (ULSD) start-up burners, each with a maximum heat input rate of 60 MMBtu/hr. *Id.* The Facility would have an electrical generation capacity of 40-MW and would be located approximately 2 km from the center of Forestdale. *Id.*

Based on a 96% capacity factor, the Facility would emit the following amounts of air pollutants (in tons per year):

- PM 2.5:63
- SO2: 45
- NOx: 110
- CO:255
- VOC: 40.

Id. However, as part of the site plan approval process for the Village of Forestdale, the Facility's operation is limited to no more than 6,500 hours per year, which limits the Facility to a capacity factor of 75%. *Id.* This limitation was adopted to mitigate the impact of log trucks bringing raw logs to the Facility for processing into pellet fuel. *Id.* The limitation is included in the site plan approval and can be enforced by the building inspector of the Village of Forestdale. *Id.* Based on this 75% capacity factor, the Facility would emit the following amounts of air pollutants (in tons per year):

- PM 2.5:47
- SO2: 32
- NOx:80
- CO:190
- VOC: 30.

Id. In addition, the Facility would emit 350,000 tons per year of greenhouse gas emissions in carbon dioxide equivalents (CO_{2e}) when operating at 96% capacity. *Id.*

The NAD Petition. NUARB is authorized to issue preconstruction permits under § 7475 of the CAA pursuant to the EPA's delegation of authority. *Id.* The entire State of New Union is considered to be an attainment, or PSD area, under the CAA. *Id.*; 42 U.S.C. § 7407(d) (2012).

On January 15, 2013, Sylvanergy petitioned NUARB for a NAD, which is a determination that it is not required to obtain a PSD preconstruction permit under § 7475 of the CAA. *Id.* Sylvanergy believed it did not have the potential to emit pollutants in excess of the relevant thresholds under § 7479(1) for two reasons. *Id.*

First, Sylvanergy contended it was not a "fossil-fuel fired" source subject to the 100-ton-per year, "major emitting facility" threshold applicable to such plants. R. at 6. Second, Sylvanergy contended that it did not have the potential to emit more than the otherwise-applicable threshold of 250 tons per year of regulated pollutants. *Id.* In making this argument, Sylvanergy relied on the Village of Forestdale site plan approval's limitation on hours of operation to reduce its potential to emit carbon monoxide below the threshold. *Id.* NUARB rejected these arguments and denied the NAD. *Id.* In doing so, NUARB reasoned that the Facility's inclusion of ULSD start-up burners made it a fossil-fuel fired facility, and that the operating hours restriction in the site plan was not a "federally enforceable" limitation, as required by 40 C.F.R. § 52.21(b)(4), in order to reduce the Facility's emitting potential below the thresholds. *Id.*

The PSD Permit. Sylvanergy then filed for a PSD preconstruction permit, and NUARB published a draft of the permit on September 12, 2013, with the relevant applicability determination information. *Id.* Save Our Climate ("SOC"), a non-profit environmental protection group, filed extensive public comments. *Id.* NUARB issued the permit on June 12, 2014. *Id.* NUARB approved Sylvanergy's flue controls for particulates, sulphur dioxide, nitrogen oxides, carbon monoxide, and VOCs as constituting Best Available Control Technology ("BACT"). *Id.* These permit requirements are not being challenged. *Id.*

NUARB also conducted a BACT review for GHG emissions from the Facility, using a 96% capacity factor. *Id.* Sylvanergy argued that it should be viewed as having zero GHG emissions, but NUARB disagreed. *Id.* SOC filed detailed comments on the proposed permit and argued that BACT for the GHGs emitted from the Facility was a wood gasification and partial carbon capture and storage plant. *Id.*

The BACT Analysis. NUARB then conducted what it considered to be a top-down approach to available control technologies for GHGs. Its analysis went as follows:

a. NUARB considered carbon capture and storage as the technology with the greatest reduction of GHGs, but it rejected the technology on the grounds that there was no proven technology for removing CO_2 from the dilute flue gas streams that result from biomass combustion.

b. NUARB considered whether alternative fuels such as natural gas or oil would lower carbon emissions for a 40-MW generation facility, but it rejected this option because it would redefine the Facility.

c. NUARB also rejected the implementation of wood gasification and partial carbon capture stating it would redefine the Facility.

d. NUARB then considered the implementation of a Sustainable Forest Plan, which would require Sylvanergy to purchase and maintain a dedicated reforestation area. NUARB reasoned that, based on an assumed production rate of 10 dry tons of wood per hectare per year, acquisition of 25,000 hectares of dedicated forest land would offset about 70% of GHG emissions and would cost about $10 million. NUARB also maintained that this was required by New Union Executive Order 005-12, issued by Governor Halley Comet, on recommendation of the Governor's Task Force on Climate Change and Sustainability. Under Executive Order 005-12, all state agencies in New Union must, to the maximum extent allowed by law, ensure that any new construction project they undertake or approve will be carbon neutral.

R. at 6-7.

Sylvanergy and SOC each filed timely petitions for review of the permit with the EAB. R. at 7. The EAB determined that it lacked jurisdiction to review NUARB's NAD. *Id.* The EAB further held that neither party's petition for review identified a clearly erroneous factual or legal determination that would justify granting the petition for review. R. at 13. Accordingly, the petitions were denied. R. at 14. Sylvanergy and SOC then filed petitions under § 7607(b) seeking judicial review of the PSD preconstruction permit.

SUMMARY OF THE ARGUMENT

Under the Clean Air Act's judicial review statute, Sylvanergy had 60 days from the date notice of NUARB's denial of its request for a NAD. Because Sylvanergy did not meet this filing deadline, and due to the filing deadline's jurisdictional nature, this Court lacks jurisdiction to review NUARB's applicability determination. Further, even if this Court did have jurisdiction to review NUARB's determination, NUARB correctly determined that Sylvanergy was a "major emitting facility" because it is a "fossil-fuel fired" source due to its combustion of fossil fuels and its potential to emit more than 100 tons per year of regulated pollutants; additionally, there are no "federally enforceable" limitations to bring its carbon monoxide emissions below 250 tons per year—it is a "major emitting facility" subject to PSD review under either category.

NUARB correctly determined that Sylvanergy is required to undergo PSD review for GHG emissions under the Supreme Court's ruling in *Utility Air Regulatory Group*. In light of this ruling and the EPA's implementing regulation, major sources that are subject to PSD review for other criteria pollutants must also undergo PSD review for GHGs if they are expected to emit more than a *de minimis* amount. Sylvanergy's proposed facility is expected to emit 350,000 tons per year of GHGs—well above a *de minimis* rate. Because Sylvanergy was required to undergo PSD review for its other criteria pollutant emissions, it is now required to also undergo PSD review for GHGs.

When regulation of GHG emitters began, the EPA published the Deferral Rule, exempting biogenic emissions for a three-year period. This rule, however, was vacated by the D.C. Circuit in *Center for Biological Diversity*. Even if the rule had not been vacated, it could not operate to exempt Sylvanergy's facility because, by the rule's own language, it would have expired. Accordingly, Sylvanergy would not have been exempt and would now be subject to PSD review for GHGs.

Under PSD review, NUARB erred in its BACT analysis by excluding wood gasification and partial carbon capture and storage. NUARB correctly determined that the technology was feasible in Step Two of the analysis; however, it incorrectly eliminated the technology on the grounds that it "redefined the source." It has long been accepted that requiring a facility to change its primary fuel source or to completely redesign its facility is impermissible in determining BACT. Requiring *minor* changes, however, in order to accommodate new technology is acceptable. Partial carbon capture and storage may require Sylvanergy to make minor modifications to the construction of the Facility, but it still retains the fundamental purpose and fuel source. Accordingly, it does not redefine the Facility.

NUARB further erred in its BACT analysis by failing to consider the adverse environmental impacts of the Sustainable Forest Plan. SOC raised significant concerns regarding the negative environmental impacts the plan would have; however, these comments were never addressed by NUARB. Indeed, NUARB *ignored* these concerns and instead relied on an inapplicable state-issued Executive Order to justify the plan. The EPA's regulations require that the permitting authority adequately consider each concern and provide detailed analyses for rejecting any concerns. NUARB failed to do either of these and dismissed the issues with a conclusory statement. This clearly violates the EPA's regulations and warrants reversible error. As a result, this Court should remand this case for NUARB to conduct a correct BACT analysis as required by the EPA.

STANDARD OF REVIEW

Under section 706 of the Administrative Procedure Act ("APA"), NUARB's decision is presumed to be valid. *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 17-18 (D.C. Cir. 2012). Nevertheless, the Court "must reject agency action if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Id.* at 18 (quoting 5 U.S.C. § 706(2)(A) (2012)). Even an agency decision of "less than ideal clarity" should be upheld so long as "the agency's path may reasonably be discerned." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007) (citations and internal quotation marks omitted).

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO REVIEW NUARB'S DENIAL OF SYLVANERGY'S REQUEST FOR A NON-APPLICABILITY DETERMINATION BECAUSE IT IS TIME-BARRED UNDER § 7607(B)'S 60-DAY FILING DEADLINE.

The EAB appropriately framed this Court's jurisdiction over Sylvanergy's petition for review of NUARB's applicability determination: "Sylvanergy *had* the option of seeking judicial review of the denial of the NAD, *and failed* to avail itself of that option." R. at 8 (emphasis added). Under § 7607(b), an aggrieved party must file a petition for review within 60 days of the date on which the EPA's action appears in the *Federal Register*. 42 U.S.C. § 7607(b)(1) (2012). Moreover, because the 60-day filing deadline in § 7607(b) is jurisdictional, it rings the death knell for Sylvanergy's petition for review of NUARB's applicability determination. Sylvanergy did not petition this Court to review NUARB's denial of the NAD within 60 days of its notice of the action. Indeed, Sylvanergy waited almost a year to petition this Court. Therefore, § 7607(b)'s 60-day filing deadline deprives this Court of jurisdiction over Sylvanergy's petition to review NUARB's denial of the NAD because it was untimely filed and is thus time-barred.

A. Sylvanergy Did Not File its Petition for Review of NUARB's Denial of the NAD Within 60 Days From the Date Notice of Such Action.

Sylvanergy's petition to review NUARB's denial of the NAD is late, and is therefore time-barred. The CAA provides:

> [a]ny petition for review under [§ 7607(b)(1)] *shall be filed within sixty days* from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.

42 U.S.C. § 7607(b)(1) (2012) (emphasis added). Clearly, the statute establishes a filing deadline of 60 days in order to confer jurisdiction. Sylvanergy attempts to challenge NUARB's denial of its request for a NAD. Sylvanergy petitioned NUARB for such NAD on January 15, 2013. R. at 5. First, NUARB denied the request via written notification. Next, NUARB published a draft permit for public comment on September 12, 2013, which also included the relevant applicability determination information. *Id.* at 6. NUARB then issued the PSD permit on June 12, 2014. *Id.*

Under § 7607(b)'s 60-day filing deadline, Sylvanergy therefore had, at the very latest, 60 days from June 12, 2014.[1] Sylvanergy petitioned this Court well after 60 days from June 12, 2014. Indeed, the EAB order from which Sylvanergy appeals was not issued until over a year after NUARB issued its applicability determination. Consequently, § 7607(b)'s filing deadline deprives this Court of jurisdiction over Sylvanergy's petition for review of NUARB's denial of the NAD. *See Hawaiian Elec. Co. v. EPA*, 723 F.2d 1440, 1445 (9th Cir. 1984) (holding that the court lacked

1. There is certainly an argument that the 60-day filing deadline began to run at the time Sylvanergy either received notice of the denial by written notification or when NUARB published the draft permit with the relevant applicability determination information. *See Hawaiian Elec. Co. v. EPA*, 723 F.2d 1440, 1445 (9th Cir. 1984) (starting the clock on a company's petition for review of a PSD applicability determination when the company first received notice and not when the action was published in the *Federal Register*). Since, however, Sylvanergy does not meet the 60-day filing deadline from the very latest date, June 12, 2014, the Court need not reach these arguments.

jurisdiction to review a company's petition to review a PSD applicability determination because the company did not file its petition within 60 days of notice of such determination); *Puerto Rican Cement Co. v. EPA*, 889 F.2d 292, 299 (1st Cir. 1989) (same); *Utah ex rel. Utah Dep't of Envtl. Quality, Div. of Air Quality v. EPA,*750 F.3d 1182, 1184 (10th Cir. 2014) (same);*Okla. Dep't of Envtl. Quality v. EPA,*740 F.3d 185, 191 (D.C. Cir. 2014) (same).

B. Section 7607(b)'s 60-Day Filing Deadline is Jurisdictional in Nature and Thus Deprives this Court of Jurisdiction Over NUARB's Denial of the NAD.

Admittedly, this is a bit of a vexed question due to the Seventh Circuit's decision in *Clean Water Action Council of Northeastern Wisconsin, Inc. v. EPA*, 765 F.3d 749 (7th Cir. 2014). In *Clean Water Action Council*, the Seventh Circuit ruled, in direct contradiction to the Tenth Circuit in *Utah v. EPA,*765 F.3d 1257 (10th Cir. 2014) and the D.C. Circuit in *Okla. Dep't of Envtl. Quality v. EPA,* 740 F.3d 185 (D.C. Cir. 2014), that § 7607(b)'s 60-day filing deadline *is not* jurisdictional. This Court, however, should find the wealth of case law contrary to the Seventh Circuit's lone conclusion to this question amply persuasive, and rule that the 60-day filing deadline in § 7607(b) *is* jurisdictional.

First, to sum up its rationale in holding that § 7607(b)'s filing deadline *is not* jurisdictional, the Seventh Circuit stated:

> Congress could have framed the filing and venue rules in jurisdictional terms, but it did not.Section 7607(b)does not mention jurisdiction. Nor does§ 7607(b)use language that is traditionally understood as jurisdictional. And the Supreme Court has not indicated that the§ 7607filing deadline is jurisdictional. That the Council did not bring its claim within 60 days of the regulation's publication (or in the D.C. Circuit) therefore does not affect this court's jurisdiction.

Clean Water Action Council, 765 F.3d at 752 (internal citations omitted). The Tenth Circuit in *Utah*, however, addresses each of these points and applies well-established precedent and sound logic to reach a predictable conclusion: § 7607(b)'s filing deadline

is jurisdictional. *Utah*, 765 F.3d at 1262 ("Accordingly, we adhere to the conclusion stated in our panel opinion: The 60–day deadline in§ 7607(b)(1)is jurisdictional, and we lack jurisdiction over the petitions because PacifiCorp and Utah filed their petitions late."); *see also Okla. Dep't of Envtl. Quality,* 740 F.3d at 191 (reaching the same conclusion as the Tenth Circuit in *Utah*).

Beginning with first principles, filing deadlines can be jurisdictional or non-jurisdictional, and in deciding which deadlines are jurisdictional, the court must apply a "bright-line" rule. *See Sebelius v. Auburn Reg'l Med. Ctr.,* 133 S. Ct. 817, 824 (2013). This rule focuses on Congress's stated intention. *Id.* When Congress clearly states that a deadline is jurisdictional, the court must regard it as jurisdictional.*Id.* To make its intention "clear," however, Congress need not use any particular words. *Id.* Thus, in determining whether Congress has spoken clearly, the court must focus on the legal character of the deadline, as shown through its text, context, and historical treatment. *Utah,* 765 F.3d at 1258 (citing *Reed Elsevier, Inc. v. Muchnick,*559 U.S. 154, 166 (2010)).

The text of § 7607(b) uses jurisdictional terminology: "shall" and "petition for review." 42 U.S.C. § 7607(b)(1) (2012); *see Auburn Reg'l Med. Ctr.*, 133 S. Ct. at 825–26, (stating that the words "shall" and "notice of appeal" carry "jurisdictional import" in connection with the statutory deadline for appeals from district courts). This "statutory language reflects Congress's explicit recognition that the 60-day deadline is jurisdictional." *Utah,* 765 F.3d at 1260.

Much like the statutory text, the context of § 7607(b) also leads to the only logical conclusion here: it is jurisdictional. Section 7607(b) not only supplies a deadline, but also serves as the jurisdictional basis for petitions like the present one. *See Harrison v. PPG Indus., Inc.,* 446 U.S. 578, 593 (1980) (stating that "Congress . . . vested the courts of appeals with jurisdiction under [§ 7607(b)(1)]."). Further, without § 7607(b)(1), this Court would lack jurisdiction over any petition under the CAA because the federal government would enjoy sovereign immunity in suits against the EPA. *See Sierra Club v. Whitman,* 268 F.3d 898, 901 (9th Cir. 2001) ("Suits against the EPA, as against any agency of the United States, are barred by sovereign immunity, unless

there has been a specific waiver of that immunity."); *see also FDIC v. Meyer,* 510 U.S. 471, 475 (1994) (stating that sovereign immunity shields federal agencies from suit). Thus, Congress waived sovereign immunity through § 7607(b)(1). *See Royster–Clark Agribusiness, Inc. v. Johnson,* 391 F. Supp. 2d 21, 25-26 (D.D.C. 2005).

Though § 7607(b)(1) waives sovereign immunity, the waiver contains limitations, including the 60–day deadline. Through this deadline, § 7607(b)(1) serves a jurisdictional function by restricting the congressional waiver of sovereign immunity. *See Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands,* 461 U.S. 273, 287 (1983) ("When waiver legislation contains a statute of limitations, the limitations provision constitutes a condition on the waiver of sovereign immunity."). This jurisdictional function connotes that the 60–day deadline is itself jurisdictional. *See Miller v. FDIC,* 738 F.3d 836, 845-46 (7th Cir. 2013); *see also United States v. McGaughy,* 670 F.3d 1149, 1156 (10th Cir. 2012).

Finally, not only does the statutory text of § 7607(b) and its context firmly support the argument that the 60-day filing deadline is jurisdictional, the historical treatment of the provision wrings out the last drops of the Seventh Circuit's argument to the contrary in *Clean Water Council*. For example, filing deadlines have long been considered jurisdictional when they involve appeals to Article III courts. *See Utah*, 765 F.3d at 1261 ("Section 7607(b)(1), governing appeals to article III courts, illustrates the type of deadline long-considered jurisdictional."); *United States v. McGaughy,* 670 F.3d at 1156 ("Historically, certain types of restrictions have long been held to be jurisdictional—the epitome of these are time restrictions for taking an appeal."); *see also Bowles v. Russell,* 551 U.S. 205, 209 n.2 (2007) ("[I]t is indisputable that time limits for filing a notice of appeal have been treated as jurisdictional in American law for well over a century.").

If this Court were to rule that § 7607's 60-day filing deadline is not jurisdictional, thus conferring jurisdiction over Sylvanergy's untimely petition for review of NUARB's applicability determination, it would not only cut against well-established precedent and Congressional intent, it would

effectively bleed the filing deadline of all meaning and bless untimely petitions to the courts of appeal. Thus, § 7607(b)(1)'s 60-day filing deadline applies and is jurisdictional, depriving this Court of jurisdiction over Sylvanergy's untimely petition for review of NUARB's denial of the NAD.

C. The "Grounds Arising After" Exception for § 7607(b)'s 60-Day Filing Deadline and the "Reopener Doctrine" Do Not Excuse Sylvanergy's Untimely Petition.

Section 7607(b) provides a limited exception to its 60-day filing deadline, which allows for parties to file a petition after the 60-day deadline if that petition is based "solely on grounds arising after such sixtieth day." 42 U.S.C. § 7607(b)(1) (2012). Unfortunately for Sylvanergy, "better late than never" is not sufficient grounds to file an untimely petition here. Further, the "Reopener Doctrine" does little more to cure Sylvanergy's jurisdictional defect. As a result, this Court lacks jurisdiction to review NUARB's denial of the NAD.

Courts have interpreted the "grounds arising after" language, as it appears in the CAA and in the judicial review provisions of other statutes, as granting a new filing period where a petitioner's claims were not ripe at the time of the original action. *See, e.g., Am. Road & Transp. Builders Ass'n v. EPA*, 705 F.3d 453, 457 (D.C. Cir. 2013) (interpreting 42 U.S.C. § 7607(b)(1) (2012)); *Grp. Against Smog & Pollution, Inc. v. EPA*, 665 F.2d 1284, 1289-90 (D.C. Cir. 1981) (noting that the legislative history of § 7607(b)(1), indicates that the exception was intended for circumstances where "significant new information has become available"); *Petro-Chem. Processing, Inc. v. EPA*, 866 F.2d 433, 437 n.4 (D.C. Cir. 1989) (holding that RCRA's identical language "does not apply in these cases, in which the substantive grounds for the petitions arose, if at all, before the time limit expired."). Here, Sylvanergy's claims were ripe during the original filing period, and no intervening events gave rise to new claims addressed in these petitions.

Similarly, this Court would not have jurisdiction under the "Reopener Doctrine," which is limited to cases where an agency explicitly or implicitly reopens the substance of the action and

"demonstrates that the agency 'ha[s] undertaken a serious, substantive reconsideration of the [existing] rule.'" *P & V Enters. v. U.S. Army Corps of Eng'rs*, 516 F.3d 1021, 1023-26 (D.C. Cir. 2008) (quoting *Nat'l Mining Ass'n v. U.S. Dep't of Interior*, 70 F.3d 1345, 1352 (D.C. Cir. 1995)); *see also Pub. Citizen v. Nuclear Regulatory Comm'n*, 901 F.2d 147, 150-51 (D.C. Cir. 1990) (noting that "reopener" challenges are unavailable where an agency has "merely republished an existing rule in order to propose minor changes to it."); *see also Utah ex rel. Utah Dep't of Envtl. Quality, Div. of Air Quality v. EPA*, 750 F.3d 1182, 1185-86 (10th Cir. 2014) (declining to adopt the "Reopener Doctrine" but stating that it would not apply to the EPA's changing of a published filing deadline). Here, no event—including the appeal to the EAB and its subsequent order—demonstrated any intent on EPA's part to undertake a "substantive reconsideration" of the applicability determination. R. at 8.

Sylvanergy did not file its petition for review of NUARB's applicability determination within 60 days of date notice of the action. Therefore, under § 7607(b)'s 60-day filing deadline, that petition now carries a jurisdictional defect and jurisdictional defects are fatal. This Court therefore lacks jurisdiction to review Sylvanergy's untimely petition for review of NUARB's applicability determination.

II. EVEN IF THIS COURT DID HAVE JURISDICTION TO REVIEW NUARB'S DENIAL OF SYLVANERGY'S REQUEST FOR A NON-APPLICABILITY DETERMINATION, NUARB PROPERLY DETERMINED THAT THE SYLVANERGY FACILITY IS A "MAJOR EMITTING FACILITY" SUBJECT TO PSD REVIEW.

Even if this Court did have jurisdiction to review NUARB's applicability determination, Sylvanergy is still subject to PSD review because NUARB properly determined that the Sylvanergy facility is a "major emitting facility." NUARB reasonably interpreted Clean Air Act statutes and its implementing regulations in determining that the Sylvanergy facility is a "fossil-fuel fired" source. Even if it was not, the Facility has the potential to emit more than 250 tons per year of carbon

monoxide—either way, the Facility is a "major emitting facility" subject to PSD review. Thus, because Sylvanergy cannot demonstrate that NUARB's determination was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," this Court must uphold NUARB's determinations. 5 U.S.C. § 706 (2012); *see also Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) ("Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.").

A. The Sylvanergy Facility is a "Fossil-Fuel Fired" Source Subject to the 100 Ton-Per-Year Threshold Under § 7479(1) of the Clean Air Act.

The PSD requirements under the Clean Air Act apply to the construction of any new "major emitting facility." 42 U.S.C. § 7479 (2012); 40 C.F.R. § 52.21(a)(2) (2015). A facility is a "major emitting facility" if it falls within one of the twenty-six listed categories of sources—one of which being "[f]ossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input"—and emits or has the potential to emit one hundred tons or more of any regulated pollutant per year. *Id.* The law also considers a facility not among the listed categories as a major emitting facility if it emits, or has the potential to emit, 250 tons per year or more of any regulated pollutant. *Id.* Accordingly, since NUARB correctly determined that the Sylvanergy facility was a "fossil-fuel fired" source subject to the 100-ton-per-year threshold, it is a "major emitting facility" subject to PSD review.

Although the Clean Air Act does not expressly define "fossil-fuel fired" under its PSD provisions, it does however, define it under its New Source Performance Standards ("NSPS"); specifically, subpart D entitled "Standards of Performance for Fossil-Fuel-Fired Steam Generators." There, the EPA defines a "fossil-fuel-fired steam generation unit" as a "furnace or boiler used in the process of burning fossil fuel for the purpose of producing steam by heat transfer." 40 C.F.R. § 60.41 (2015).

Applying this definition, the Sylvanergy facility is a "fossil-fuel fired" source subject to the 100-ton-per-year threshold in the

"major emitting facility" definition. The Facility would house a 500 million Btu/hour electricity generation unit capable of 40-MW of electrical generation. R. at 5. The facility will also consist of "two ultra-low sulfur diesel (ULSD) start-up burners, each with a maximum heat input rate of 60 MMBtu/hr." *Id.* Further, the Facility will emit 110 tons of NOx per year and 255 tons of CO per year. *Id.* An application of the facts to a literal reading of the CAA definition therefore renders NUARB's determination more than reasonable, and certainly not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706 (2012). The Sylvanergy facility is a clearly a "furnace or boiler used in the process of burning fossil fuel for the purpose of producing steam by heat transfer."

Furthermore, NUARB's determination is consistent with the Clean Air Act. Two other programs under the Act define "fossil-fuel fired" in harmony with NUARB's determination here. To illustrate, the CAA's "Acid Rain Program" defines "fossil-fuel fired" as "the combustion of fossil fuel or any derivative of fossil fuel, alone or in combination with any other fuel, independent of the percentage of fossil fuel consumed in any calendar year (expressed in mmBtu)." 40 C.F.R. § 72.2 (2015). Similarly, the CAA's "Cross-State Air Pollution Rule" defines a "fossil-fuel fired" unit as one that "combusts any amount of fossil fuel in 2005 or later." Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 Fed. Reg. 48,207 (Aug. 8, 2011) (to be codified at 40 C.F.R. pts. 51, 52, 72, 78, 97). The common "fossil-fuel fired" denominator in the CAA: combustion of fossil fuel. Here, NUARB's determination that Sylvanergy's sulfur diesel burners subject it to the 100-ton-per-year "major emitting" threshold is consistent with the Act and is certainly not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706 (2012).

Consequently, this Court must uphold NUARB's determination that the Sylvanergy facility is a "fossil-fuel fired" source subject to the 100-ton-per-year "major emitting facility" threshold, and is thus subject to PSD review.

B. Because the Restriction on Operating Hours in the

Village of Forestdale's Site Plan Approval is Not a "Federally Enforceable" Limitation, the Sylvanergy Facility has the "Potential to Emit" More than 250 Tons Per Year of Carbon Monoxide.

Even if the Sylvanergy facility were not a "fossil-fuel fired" source, it would nevertheless be subject to PSD review because it has the "potential to emit [250] tons per year or more of any air pollutant." 42 U.S.C. § 7479 (2012) (defining "major emitting facility"). Based on a 96% capacity factor, the Sylvanergy facility would emit 255 tons per year of carbon monoxide, putting it squarely within the definition of a "major emitting facility." R. at 5. Sylvanergy would contend, however, that the limitation on its operating hours, present in the Village of Forestdale's site plan approval, is a federally enforceable limitation limiting its capacity factor to 75%. This in turn would limit its carbon monoxide emission to 190 tons per year, and it therefore would not have the "potential to emit" 250 tons per year. R. at 5-6. NUARB correctly determined, however, that the limitation on operating hours in the Village of Forestdale's site plan approval is not a "federally enforceable" limitation. R. at 5. Consequently, Sylvanergy is—yet again—a "major emitting facility" subject to PSD review.

The "potential to emit" means:

> the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design *if the limitation or the effect it would have on emissions is federally enforceable*.

40 C.F.R. § 52.21(b)(4) (2015) (emphasis added). So, although a restriction on operating hours is expressly listed in the definition of "potential to emit" as a limiting factor in a source's design, such restriction must still be "federally enforceable."

In turn, the term "federally enforceable" means "'legally and practicably enforceable *by a state or local air pollution control agency*.'" *Weiler v. Chatham Forest Prods., Inc.*, 392 F.3d 532, 535 (2d Cir. 2004) (emphasis added) (quoting EPA Interim Policy on

Federal Enforceability of Limitations on Potential to Emit, at 3-4 (Jan. 22, 1996)); *see also* 40 C.F.R. § 51.166 (2015) (emphasis added) (defining "federally enforceable" as "all limitations and conditions which are *enforceable by the Administrator*"). Accordingly, a proposed facility that is physically capable of emitting major levels of the relevant pollutants is to be considered a "major emitting facility" under the CAA unless there are legally and practicably enforceable mechanisms in place that are enforceable by a state or local air pollution control agency.

The limitation on hours of operation at issue was adopted in order to mitigate the impact of log trucks bringing raw logs to the Facility, and would bring the operating hours of the Facility to 6,500 per year. R. at 5. Crucially though, the limitation is "enforced by the building inspector of the Village of Forestdale." *Id.* This limitation is therefore far from being "federally enforceable." Indeed, the *state and local* air pollution agencies may not even enforce this limitation. Much like NUARB's determination that the Sylvanergy facility is a "fossil-fuel fired" source, the applicable definitions here foreclose Sylvanergy's arguments to the contrary: NUARB's determination is more than reasonable, and certainly not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706 (2012). This Court therefore must uphold NUARB's determination that the hours-of-operation-limitation in the Village of Forestdale's site plane approval is not a "federally enforceable" limitation bringing Sylvanergy's carbon monoxide emissions below 250 tons per year. The Sylvanergy facility is thus a "major emitting facility" subject to PSD review.

This Court should not—indeed *cannot*—disturb NUARB's determinations. Awash with reasonableness and sound logic, NUARB's determinations were grounded in applicable statutes and were certainly not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." As a result, this Court must uphold NUARB's determinations and rule that the Sylvanergy facility is a "major emitting facility" subject to PSD review.

III. THE SYLVANERGY FACILITY IS SUBJECT TO PSD REVIEW FOR GHGS BECAUSE IT IS AN

"ANYWAY SOURCE" EMITTING MORE THAN A *DE MINIMIS* AMOUNT OF GHGS.

The Supreme Court and the EPA have recently resolved a previously unsettled issue: whether GHGs are subject to regulation under the CAA. They are. Under the PSD permitting program, sources that meet certain thresholds must be "subject to the best available control technology for *each pollutant subject to regulation*" under the CAA. 42 U.S.C. § 7475(a)(4) (2012) (emphasis added). GHGs are now treated as pollutants "subject to regulation" when they are emitted from facilities that must also obtain a PSD permit "anyway" due to their emission of other pollutants. *Utility Air Regulatory Grp. (UARG) v. EPA*, 134 S. Ct. 2427, 2447-49 (2014). In ruling that GHGs are now subject to PSD review, the Supreme Court first tracked the law's recent evolution. *Id.*

In 2009, EPA published its finding that GHGs endanger both public health and welfare and that the combined emissions of these GHGs from new motor vehicles cause and contribute to air pollution that endangers public health and welfare. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009) (to be codified at 40 C.F.R. ch. 1). The regulation of GHGs in the motor vehicle industry posited the question of whether GHGs would now be regulated under PSD review. In 2011, the EPA answered this question in the affirmative. Motor vehicle GHG standards also trigger permitting requirements under the CAA. Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004 (Apr. 2, 2010) (to be codified at 40 C.F.R. pts 50, 51, 70, 71).

The EPA decided regulating *all* facilities that release GHGs under the PSD program would be nearly impossible, so it issued a rule to temper the scope of the regulation: the "Tailoring Rule." Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,523 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71). Step One of the Tailoring Rule began on January 2, 2011, and ended on June 30, 2011. *Id.* This step covers what EPA deems "anyway sources"—that is, facilities that would be subject to PSD review for GHGs if

they were subject to PSD review "anyway" based on emissions of pollutants other than GHGs. *Id.* Step Two began on July 1, 2011, and continued thereafter to cover both "anyway sources" releasing at least 75,000 tons per year of CO_{2e} and to other large emitters of GHGs. *Id.* at 31,523.

The EPA also attempted to narrow the scope of GHG regulation by exempting certain biogenic carbon emissions in the "Deferral Rule." Deferral for CO2 Emissions From Bioenergy and Other Biogenic Sources Under the Prevention of Significant Deterioration (PSD) and Title V Programs, 76 Fed. Reg. 43,490 (July 20, 2011) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71). The Deferral Rule exempts from regulation, for a period of three years, biogenic carbon dioxide sources that trigger PSD and Title V permitting. *Id.* at 43,493. In promulgating this rule, EPA cited its ongoing efforts to understand the unique characteristics of biogenic carbon dioxide and how it should be regulated. *Id.* at 15,251. The Deferral Rule also contains a provision stating that absent agency action, on July 21, 2014, biogenic carbon dioxide will be regulated under PSD and Title V programs, as modified by the Tailoring Rule. *Id.* at 43,507.

The Deferral Rule was challenged on the grounds that the plain language of the CAA requires that GHGs be subject to PSD review because of the statutory definition of "major emitting facility." *Ctr. for Biological Diversity v. EPA*, 722 F.3d 401, 409 (D.C. Cir. 2013); 42 U.S.C. § 7479 (2012) (a "major emitting facility" is any "stationary sources[]" that "emit[s], or ha[s] the potential to emit," certain specified amounts of "any air pollutant"). The court agreed with the petitioners that the EPA's rule was arbitrary and capricious because there was no documented rationale in how the EPA determined which sources to exempt from regulation. *Id.* at 411. Accordingly, the court vacated the Deferral Rule. *Id.* at 412. As a result of the Deferral Rule being vacated, biogenic facilities subject to PSD review for other pollutants are also subject to PSD review for GHGs. *In re Energy Answers Arecibo, LLC*, PSD Appeal Nos. 13-05 though 13-09, slip op. (EAB Mar. 25, 2014) (remanding a permit for PSD review for GHGs after the Deferral Rule was vacated).

In 2014, the Supreme Court reviewed this evolution of GHG regulation and answered the question of "whether it was

permissible for the EPA to determine that its motor-vehicle [GHG] regulations automatically triggered permitting requirements under the Act for stationary sources that emit [GHGs]." *UARG*, 134 S. Ct. at 2434. Put simply, the Court answered the question affirmatively—with some limitations. *Id.* at 2447.

The Court held that it was impermissible for the EPA to require PSD review for facilities' GHG emissions *solely* based on their GHG emissions. *Id.* The Court, however, stated that the EPA's decision to regulate GHGs from "anyway sources" was permissible, so long as they emit more than a *de minimis* amount. *Id.* at 2448. The Court did not indicate what would rise above a *de minimis* amount, but did state that the 75,000 tons-per-year threshold in the Tailoring Rule may be an indicator. *Id.* at 2448. In response, the EPA amended its PSD program to effectively uphold the regulation of GHGs under PSD review for "anyway sources." Prevention of Significant Deterioration and Title V Permitting for Greenhouse Gases: Removal of Certain Vacated Elements, 80 Fed. Reg. 50,199, 50,200 (Aug. 19, 2015) (codified at 40 C.F.R. § 51.166(b)(48)(iv) (2015)).

A. Sylvanergy's Proposed Facility is Subject to PSD Review for GHG Emissions Under the *UARG* Decision Because It is an "Anyway Source" Subject to PSD Review for the Emission of Other Pollutants and Emits GHGs Above a *de minimis* Level.

Sylvanergy is subject to PSD review for GHGs under the Supreme Court's ruling in *UARG* because it is subject to PSD review "anyway" for other pollutants. Sylvanergy underwent PSD review for particulates, sulphur dioxide, nitrogen oxide, and carbon monoxide. R. 6. As a result, it is an "anyway source" because it is subject to PSD review anyway for other regulated pollutants. *UARG*, 134 S. Ct. at 2448. Additionally, it emits GHGs above a *de minimis* level. Although the EPA has not yet set a true *de minimis* level, the Supreme Court intimated that the Tailoring Rule's 75,000 tons per year should be instructive. *Id.* at 2448. Guided by the Court's language, a facility that will emit

350,000 tons per year of carbon dioxide equivalents would certainly be more than a *de minimis* emitter. R. at 5.

Furthermore, it is irrelevant that the *UARG* decision was rendered after Sylvanergy's permit process began. "The Clean Air Act unambiguously requires [a facility] to demonstrate that [it] complies with the regulations in effect at the time the [p]ermit is issued." *Sierra Club v. EPA*, 762 F.3d 971, 973-74 (9th Cir. 2014) (remanding a permit for PSD review of GHGs because the regulation of GHGs under the PSD program began while the facility's permit was being judicially reviewed). Accordingly, even though Sylvanergy began its permitting process before the *UARG* decision, its permit must reflect the regulations as amended by the decision.

B. Sylvanergy's Proposed Facility is Not Exempt from PSD Review for GHGs Under the Deferral Rule Because the Rule was Vacated and has Otherwise Expired.

The Deferral Rule exempts biogenic carbon dioxide sources from triggering PSD and Title V permitting requirements for a period of three years. 76 Fed. Reg. at 43,493. Sylvanergy falls into such category because it would release biogenic carbon dioxide at a rate of 350,000 tons per year of carbon dioxide equivalents. R. at 5. The Deferral Rule, however, was vacated upon review in the D.C. Circuit. *Ctr. for Biological Diversity*, 722 F.3d at 412. Therefore, such exemption does not apply.

Even if the rule were not vacated, the rule itself states that it expired on July 21, 2014. 76 Fed. Reg. at 43,507. Moreover, it is irrelevant that the rule was still in effect at the time NUARB published Sylvanergy's draft permit. Similarly, in *Energy Answers Arecibo*, the Deferral Rule was still effective at the time the draft permit was being reviewed; however, when the permit was in front of the EAB, the Deferral Rule had been vacated. PSD Appeal Nos. 13-05 though 13-09, slip op. at 29. The Board remanded the case with an order to conduct PSD review for GHGs because the permit was no longer in compliance with the current law. *Id.* at 29, 30. Likewise, the EAB here appropriately recognized that Sylvanergy is not exempt from PSD review for GHGs because that exemption expired. R. at 6.

The EAB correctly determined that Sylvanergy is subject to PSD review for GHGs because it is an "anyway source" that releases GHGs above a *de minimis* level. Further, it is not exempt under the Deferral Rule because it has been vacated and otherwise is expired.

IV. NUARB IMPROPERLY REJECTED CONSIDERATION OF A WOOD GASIFICATION AND PARTIAL CARBON CAPTURE AND STORAGE PLANT AS BACT FOR SYLVANERGY BECAUSE IT IS TECHNICALLY FEASIBLE AND DOES NOT REDEFINE THE SOURCE.

Any major stationary source, including a bioenergy facility, that is required to obtain a PSD permit must address the BACT requirement for GHGs if it is subject to PSD review for other pollutants and emits GHGs above a *de minimis* level. *UARG*, 134 S. Ct. at 2448; 40 C.F.R. § 52.166(b)(48) (2015). BACT means:

> an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant.

42 U.S.C. § 7479(3) (2012).

To determine BACT, the EPA recommends following its 5-step process, known as the "top-down" method. U.S. EPA Office of Air Quality Planning & Standards, *New Source Review Workshop Manual* at B.2 (Oct. 1990) (Draft) ["NSR Manual"]. This same top-down method should be followed when conducting a BACT analysis for GHG emissions. U.S. EPA Office of Air Quality Planning & Standards, *PSD and Title V Permitting Guidance for Greenhouse Gases* at 17 (Mar. 2011).

Though the NSR Manual's top-down analysis is not mandatory, a careful and detailed analysis of the criteria

identified in the regulatory definition is nevertheless required; the methodology in the NSR Manual provides a framework that assures adequate consideration of the regulatory criteria and consistency within the PSD permitting program. *In re Cardinal FG Co.*, 12 E.A.D. 153, 162 (EAB 2005). Consequently, if the required criteria are not considered, the case will be remanded with instructions to follow the top-down method. *In re Knauf Fiber Glass*, 8 E.A.D. 121 (EAB 1999).

A. NUARB Should Have Followed the 5-step BACT Analysis Recommended by the EPA.

1. ***Step One*** of the BACT analysis is to identify all "potentially available" control technologies. NSR Manual at B.5.
2. In ***Step Two***, control technologies are eliminated if they are "technically infeasible." *Id.* at B.7.
   a. A control technology is presumed to be feasible if it is "demonstrated." *In re Cardinal FG Co.*, 12 E.A.D. at 162. In turn, a control technology is demonstrated if it has been installed and operated successfully elsewhere on a similar facility. *Id.* (citing NSR Manual at B.17).
   b. A control technology is also considered feasible under Step Two if it is both "available" and "applicable." *Id.* Technology is considered available if it "can be obtained by the applicant through commercial channels or is otherwise available within the common sense meaning of the term." *Id.* An available technology is applicable if it "can reasonably be installed and operated on the source type under consideration." *Id.* Conversely, "technologies in the pilot scale testing stages of development would not be considered available for BACT review." *Id.*
   c. In Step Two, a permitting authority's decision to eliminate potential control options as a matter of technical infeasibility must be adequately explained and justified. *In re Steel Dynamics*, 9 E.A.D. 165, 192 (EAB 2000) ("cursory, conclusory, speculative, and unsubstantiated opinion[s]" were not sufficient). Where a more stringent technology is not evaluated as BACT because the permitting authority erred in not identifying it as an

"available" option, a remand is appropriate. *In re Cardinal FG Co.*, 12 E.A.D. at 168.

3. In ***Step Three***, the remaining control technologies are ranked in order of overall control effectiveness. NSR Manual at B.8.
4. In ***Step Four***, the applicant considers energy, environmental, and economic impacts of each control technology. *Id.* If a control technology is eliminated at this step, the rationale should be documented for public record. *Id.* at B.9.
5. Finally, in ***Step Five***, the most effective control option that has not been eliminated yet is selected as BACT for the pollutant and emission unit under review. *Id.*

In selecting BACT, the EPA normally does not require that the facility change the fundamental scope of the plant proposed by the permit applicant—known as redefining the source. *Sierra Club v. EPA*, 499 F.3d 653, 654 (7th Cir. 2007); NSR Manual at B.13. For example, requiring a coal-fired plant to use nuclear fuel would require redesign from the ground up. *Id.* However, "pollution controls that retain the facility's fundamental product or purpose do not 'redefine the source,' regardless of whether they require modification of the permit-applicant's *preferred* design." *In re Prairie State Generating Co.*, 13 E.A.D. 1, 20 (EAB 2006) (emphasis added).

In determining whether technology impermissibly redefines the source, the facility's fundamental product or purpose is determined by examining the proposed facility's application. *Id.* at 22. The purpose should be objective and must focus on the overall business purpose for the proposed facility. *Utah Chapter of the Sierra Club v. Air Quality Bd.*, 226 P.3d 719, 732 (Utah 2009). Permitting authorities should be "wary of the risk of applicants describing a project in such a limited manner that they are able to circumvent the goals of BACT, which include encouraging the use of new technologies." *Id.*

Here, NUARB correctly determined that a wood gasification and partial carbon capture and storage plant is technically feasible, but it erred in its BACT analysis by failing to follow the top-down method and by incorrectly determining that the storage plant would redefine the source. NUARB's shortcomings make its decision arbitrary and capricious, warranting reversal of the

decision below and remand of the permit for a complete, correct BACT analysis.

B. NUARB Correctly Determined that Wood Gasification and Partial Carbon Capture and Storage is Technically Feasible Because it has Not Only Been Demonstrated but it is also Available and Applicable.

NUARB correctly determined that the implementation of a wood gasification and partial carbon capture and storage is technically feasible. R. at 13. The technology is feasible because it is not only demonstrated but is also available and applicable. The technology is demonstrated because it is being used at the Decatur Carbon Sequestration Demonstration facility. R. at 12. A control technology is demonstrated if it has been installed and operated successfully elsewhere on a similar facility. NSR Manual at B.17. The Decatur facility is "very similar" to the facility proposed by Sylvanergy. *Id.* Furthermore, the proposed facility is located over a geological shale formation in Forestdale that is an "ideal location" for a carbon capture and storage facility: much like the Decatur facility. *Id.* So, because of the Decatur facility's successful implementation of a partial carbon capture and storage facility, this technology is a demonstrated control technology for the Sylvanergy facility.

Additionally, partial carbon capture and storage is technically feasible because it is both available and applicable. Partial carbon capture and storage is commercially available, as proven by its usage at the Decatur plant. R. at 12. The storage plant is also applicable to Sylvanergy's proposed facility because it has been used on a similar facility—the Decatur facility. *Id.* The Rhodes and Keith study also supports the proposition that partial carbon capture and storage is feasible by using technologies already in use. *Id*; J.S. Rhodes and D.W. Keith, *Engineering Economic Analysis of Biomass IGCC with Carbon Capture and Storage*, 29 BIOMASS AND BIOENERGY 440, 441 (2005) ("Only biomass-CCS can both provide low-carbon energy products and effectively remove carbon from the natural carbon cycle."). The wood gasification and partial carbon capture and storage plant would therefore not only be potentially available

under Step One but also technically feasible under Step Two of the BACT analysis.

C. NUARB Incorrectly Determined that Wood Gasification and Partial Carbon Capture and Storage Would Redefine the Source Because it Would Not Change the Fundamental Product and Purpose of the Facility.

NUARB agreed with the factual propositions supporting the use of partial carbon capture and storage, but it incorrectly determined that the partial carbon capture and storage facility was inappropriate as BACT because it redefines the Facility. R. at 12. Sylvanergy proposed to burn fossil fuel and wood to generate electricity. R. at 13. Its proposed product and purpose are wood and the generation of electricity. Implementing the wood gasification and partial carbon capture and storage plant would advance the Facility's fundamental purpose: the generation of electricity. Implementing the wood gasification and partial carbon capture and storage plant would maintain the Facility's fundamental product: wood. The only minor modification the Facility would be subject to is gasifying the wood. The source is not redefined. *See In re Prairie State Generating Co.*, 13 E.A.D. at 20 (holding that "pollution controls that retain the facility's fundamental product or purpose do not 'redefine the source,' regardless of whether they require modification of the permit-applicant's *preferred* design"); *Sierra Club v. EPA*, 499 F.3d at 654 (holding that a BACT requirement on a coal-fired facility to rebuild the facility from the ground up to utilize nuclear fuel was redefining the source).

Also, this Court can not allow Sylvanergy to describe its project in such a limited way as to circumvent the goals of BACT. *Utah Chapter of the Sierra Club*, 226 P.3d at 732 (cautioning that permitting authorities should be "wary of the risk of applicants describing a project in such a limited manner that they are able to circumvent the goals of BACT, which include encouraging the use of new technologies"). The fundamental purpose underlying BACT is to compel "rapid adoption of improvements in technology as new sources are built." S. Rep. No. 95-127, at 29 (1977). As wood gasification and partial carbon capture and storage is

quickly becoming the standard as BACT for facilities, NUARB should not have been eliminated it. *See* Margaret E. Peloso and Matthew Dobbins, *Greenhouse Gas PSD Permitting: The Year in Review*, 42 TEX. ENVTL. L.J. 233, 245 (2012). Accordingly, it is becoming "more difficult for future applicants to dismiss CCS [carbon capture and storage] . . . as BACT." *Id.* at 253. As such, it should not have been excluded from the BACT analysis in Step Two.

Therefore, in Step Three, the remaining technologies should have been ranked by their control effectiveness. In other words, the Sustainable Forest Plan would be ranked first, and wood gasification and partial carbon capture and storage would have been ranked second.

IV. NUARB FURTHER ERRED IN ITS BACT ANALYSIS BY IMPERMISSIBLY IMPOSING THE SUSTAINABLE FOREST PLAN AS BACT FOR THE PROPOSED SYLVANERGY FACILITY BECAUSE IT FAILED TO CONSIDER ITS ADVERSE ENVIRONMENTAL IMPACTS.

Under Step Four of the BACT analysis, control technologies are to be eliminated if they have any significant or unusual environmental impacts. NSR Manual at B.47. This analysis should be conducted based on a consideration of site-specific circumstances and should be performed for the entire hierarchy of technologies. *Id.* First, the permitting authority performs a qualitative or semi-qualitative screening to narrow the analysis to discharges with potential for causing adverse environmental effects. NSR Manual at B.48. Then the mass composition of any such discharges are assessed and quantified to the extent possible, based on readily available information. *Id.* After reviewing this information, the adverse environmental effects of a technology may result in the top-control-option being elimination. NSR Manual at B.8-9.

The permit issuer must give reasonable consideration to allegations of adverse environmental impacts and must fully and meaningfully respond to any related public comments. *In re Old Dominion*, 1992 EPA App. LEXIS 37, at *10 (EAB Jan. 29, 1992); *see also* 40 C.F.R. § 124.17(a)(2) (2015) (permitting agencies must

"briefly describe and respond to all significant comments on the draft permit"). It is permissible to dismiss allegations of environmental impacts where such allegations are unsupported by evidence. *In re Old Dominion*, 1992 EPA App. LEXIS at *14. Otherwise, each allegation requires a response. These responses should not be conclusory; rather, they should provide references and detailed analyses for why the permitting authority responded to the allegations of adverse impacts the way it did. *In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 154 (EAB 2006). Where the permitting authority's rationale is not clear, its responses do not reflect careful consideration. *In re Knauf Fiber Glass*, 8 E.A.D. at 132. And where responses do not reflect careful consideration, the permitting authority has committed clear error. *Id.*

To illustrate, in *Indeck-Elwood, LLC*, the permitting authority, without citing sufficient evidence for its reasoning, simply stated that a technology would have no adverse environmental impacts. *Id.* The permitting authority's decisions were in error because they were "largely conclusory and [did] not provide or reference any more detailed analyses that support[ed] its conclusions." *Id.* Conversely, the permitting authority's reasoning is sufficiently supported when it relies on evidence to state that a technology would not have significant adverse environmental impacts. *In re Prairie State Generating Co.*, 13 E.A.D. at 46 (relying on a biological opinion that there would be no significant environmental impact).

A. NUARB Acted Arbitrarily in Step Four of its BACT Analysis by Failing to Adequately Consider Comments Raised by SOC and by Instead Relying on an Inapplicable State-Issued Executive Order.

Here, NUARB's failure to adequately address the adverse environmental impacts of the Sustainable Forest Plan constitutes clear error. SOC submitted "extensive comments and ecological studies" to support its argument that monoculture forestry practices, such as the Sustainable Forest Plan, destroy biodiversity and promote tree diseases and pest infestations. R. at 12. NUARB did not address these comments. R. at 12. NUARB's failure violates the regulatory requirement to "briefly describe and respond to all significant comments on the draft permit," 40

C.F.R. § 124.17(a)(2) (2015). NUARB's decision was therefore arbitrary and capricious.

NUARB also impermissibly relied on Governor Comet's Executive Order 005-12 in justifying its decision to impose the Sustainable Forest Plan as BACT. R. at 7. Executive Order 005-12 requires that "all State agencies in New Union must, to the extent allowed by law, ensure that any new construction project they undertake or approve will be carbon neutral." *Id.* Because the Executive Order is inapplicable here, NUARB's reliance on it was in error. First, the Executive Order applies only to "State agencies." *Id.* NUARB, however, operates under delegated authority from the EPA, so it truly functions as a federal agency. R. at 5; *In re Knauf Fiber Glass*, 8 E.A.D. at 174 (agencies operating under delegating authority are federal agencies). Therefore, the NUARB does not fall within the scope of the Executive Order.

Additionally, the Executive Order should only be complied with "to the extent allowed by law." R. at 7. Therefore, the CAA statutory scheme and principles governing the BACT analysis should govern. *In re Sierra Pac. Indus.*, PSD Appeal Nos. 13-01 through 13-04, slip op. at 31 (EAB July 18, 2013) ("Neither [an] Executive Order nor EPA policy statements, however, amend EPA's statutory or regulatory requirements and obligations."). As required by the CAA and the NSR Manual, NUARB *must* consider adverse environmental impacts and make changes accordingly in its selection of BACT. 42 U.S.C. § 7479(3) (2012) (emphasis added); NSR Manual at B.48. This consideration is so important that the permitting authority should select a slightly less effective control technology if a more effective control technology has significant adverse environmental impacts. *Mont. Env't Info. Ctr. v. Mont. Dep't Envtl. Quality,* 2004 ML 682, 2004 Mont. Dist. LEXIS 3151, at *37 (Mont., Mar. 30, 2004).

B. Under Step Four of its BACT analysis, NUARB Should Have Determined that Partial Carbon Capture and Storage is BACT Because of the Sustainable Forest Plan's Significant Adverse Environmental Impacts.

Step Four of the BACT analysis requires the permitting authority to consider economic impacts of the remaining technologies in addition to their environmental impacts. In weighing the costs of the two competing technologies, partial carbon capture and storage is admittedly not the cheapest. This is not unusual however, in the regulation of facilities. Indeed, the EPA has acknowledged that "present add-on controls for CO_2 are generally not cheap." U.S. EPA Office of Air and Radiation, *Guidance for Determining Best Available Control Technology for Reducing Carbon Dioxide Emissions from Bioenergy Production* at 24 (Mar. 2011). However, the permitting authority does not have the discretion to eliminate a technology merely because it is expensive. It only has the authority to *consider* the economic impact of a technology *in comparison* to its effectiveness and its environmental impacts. *Id.* at 17.

Here, the cost of partial carbon capture and storage is a nonstarter for three reasons. First, Sylvanergy made no objection to the technology based on its costs, and the impacts considered in Step Four are evaluated on a case-by-case basis. *Id.* In this case, the argument that the technology is too expensive must therefore fail because it is obviously not a concern for the permitted entity.

Second, even conceding that the cost of partial carbon capture should be considered, its indirect economic impacts offset its initial cost. One such indirect economic impact is potential economic benefits such as tax incentives. *Id.* at 25. Here, Sylvanergy would benefit from the federal Renewable Electricity Production Tax Credit, a per-kilowatt-hour tax credit for electricity generated by qualified energy resources including biomass. *Id.* at 26. This economic benefit mitigates the cost of partial carbon capture and storage.

Third, the adverse environmental impacts of the Sustainable Forest Plan far outweigh any economic concern about partial carbon capture and storage. The EPA recognizes that "where the

record shows that requiring a particular control option as BACT would counteract, or work at cross purposes from, policies intended to promote renewable energy and biomass, this may form part of the justification for eliminating an option from further consideration." *Id.* at 25. The EPA, and agencies exercising its delegated authority, are "charged with being the federal government's guardian of the environment." *State of New York v. Schenectady Chems., Inc.*, 459 N.Y.S.2d 971, 978 (1984). Certainly, selecting a technology that "destroy[s] biodiversity and promote[s] tree diseases and pest invasions" does not coincide with the permitting authority's role as guardian of the environment. *See* R. at 12. The permitting authority should—indeed *must*—consider these serious threats to the environment. Here, however, NUARB merely winked at the allegations with complete disregard. *Id.* This neglect not only makes its decision arbitrary and capricious but also violates the clear statutory mandate of the CAA itself. 42 U.S.C. § 7479(3) (2012) (defining BACT as "taking into account . . . environmental . . . impacts).

Due to the Sustainable Forest Plan's adverse environmental impacts, the partial carbon capture and storage facility is the most effective control technology that was not eliminated at some other step in the BACT analysis. Failing to eliminate the Sustainable Forest Plan in Step Four was clear error by NUARB. Its decision should therefore be vacated, and this Court should remand the case for a correct BACT analysis.

CONCLUSION

Sylvanergy does not have the luxury of invoking this Court's jurisdiction over its untimely petition to review a state agency's applicability determination—and even if it could, the state agency made the correct applicability determination. Additionally, the Supreme Court's decision in *UARG* subjects Sylvanergy to PSD review for its GHG emissions. Last, NUARB erred in its BACT analysis. In other words, NUARB made one correct determination that this Court lacks jurisdiction to review and one incorrect determination that this Court should remand in order to

correct the error. Therefore, in order to further the purpose of the Clean Air Act, this Court should remand the PSD permit to "insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources." 42 U.S.C. § 7470(3) (2012).